IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1056 OF 2005
ALONG WITH
CIVIL APPLICATION NO.1057 OF 2005
IN
FIRST APPEAL NO.522 OF 2003

Subhas S. Karkhanis & Ors. ... Applicants

Vs.

The State of Maharashtra & Anr. ... Respondents

Mr. A.V. Chatuphule for the applicants.

Ms. Mulekar, A.G.P. for the State.

Mr. L.C. Chougule for respondent 3/Intervenors.

CORAM: SMT. RANJANA DESAI, J.

DATED: 6TH MAY, 2005.

P.C.:-

1. The appellants in the instant first appeal have filed these two civil applications. In Civil Application No.1056 of 2005, it is, inter alia, prayed that the delay in filing the paper book be condoned and the first appeal be restored to the file and the order dated 19/8/2004 passed in Civil Application No.4521 of 2002 staying sale of the properties be restored. In Civil Application No.1057 of 2005, it is prayed that the time to file the paper book be extended by two months. The prayers made in these civil applications appear to be simple but the facts are not so simple and need to be stated in short

and the applications need to be dealt with with a little unusually longish order.

2. M/s. Popular Group of Companies is a Financial Establishment within the meaning of section 2(d) of the Maharashtra Protection of Interests of Depositors Act, 1999 (for short, "the MPID Act"). The appellants Subhash Karkhanis and Sandhya Karkhanis are the proprietors/directors thereof. Respondent 3 is the Popular Welfare Association of Investors, who has been allowed to intervene in this matter by this court.

3. It appears that about 1403 investors/depositors complained that the said financial establishment as also appellants Subhash Karkhanis and Sandhya Karkhanis, who are the proprietors/directors thereof have defaulted in returning the deposits made by them with the said financial establishment. It appears to be the case of the complainants that the appellants held out promises of unprecedented high attractive rate of interest to people on their investments and lured people into investing money with them and fraudulently defaulted in repayment of deposits. Thousands of investors have invested their hard earned money with the appellants with a hope of returns as promised by the appellants. Many of them are middle class small investors who appear to have lost all their life’s savings.

4. Investigations started from 2001. It was revealed

that several immoveable properties were acquired by the appellants out of the monies deposited with them by the small investors. Several immovable properties were identified and secured pending investigations.

5. Competent authority came to be appointed under section 4 of the MPID Act. Thirty two properties came to be attached by the Government under Notification dated 16/8/2001 issued under section 5 of the MPID Act. The competent authority filed Misc. Application No.184 of 2001 for making the attachment absolute under section 5(2) of the MPID Act. Upon receipt of the notice, the appellants filed their reply.

6. Under section 7(5) of the MPID Act, the Special Court was required to proceed to investigate the objections after following the procedure contemplated under Order XXXVII of the Code of Civil Procedure (for short, "the Code"). After considering the notification dated 16/8/2001, the affidavit of Shri R.J. Narvekar, Deputy Collector-cum-Competent Authority and the affidavits of the appellants, the Special Court came to a conclusion that the affidavits filed by the appellants under Order XXXVII Rule 3(5) of the Code do not make out any case entitling them to defend. The leave was thus refused to the appellants. The attachment was made absolute. This order was passed on 22/10/2002. On 28/11/2002, the instant first appeal came to be filed. However, it was not taken for admission. Instead, Criminal Writ Petition

No.1529 of 2003 came to be filed by the appellants challenging the notification dated 16/8/2001. The Division Bench by its order dated 19/11/2003 disposed of this writ petition. The material portion of the order passed by the Division Bench may be quoted.

> "The petition through prayer (a) seeks to challenge this attachment dated 16th August 2001 when the same has been confirmed subsequently after a proper hearing and the confirming order has been placed on record through the affidavit filed by Respondent No.2. Not only that, but we are told that a couple of properties have been sold subsequent to this attachment. The petitioners have taken their own time to file this petition and that being so, now the clock cannot be set back. In the circumstances, prayer (a) which seeks to challenge the validity of the notification dated 16th August 2001, two years after issuance thereof and after confirmation thereof by the Designated Court cannot be permitted to be entertained."

7. Thus, the Division Bench confirmed the validity of the notification dated 16/8/2001. The prayer of restoration of properties was not entertained. It appears that during this time, the instant first appeal

was kept under objections. It was adjourned on the ground that the writ petition was pending. It was only on 19/08/2004 that the present first appeal which was filed on 28/11/2002 was taken up for admission before Justice A.S. Oka. On 19/8/2004, Justice Oka passed the following order.

> "Admit. The Appellants are directed to file private paper book within three months. Printing dispensed with. If paper book is not filed within three months, the First Appeal will stand dismissed for want of prosecution without reference to the court."

8. On the same day, in Civil Application No.4521 of 2002, Justice Oka passed the following order:

> "Rule. The Respondent No.1 and Intervenor waive service. Place the C.A. for hearing high on board on 3rd September 2004. Till further orders, it is directed that the property which is already attached will not be sold. It is made clear that except for granting stay of further sale, no other operative part of the impugned Judgment and Order is stayed."

9. As per Justice Oka's order dated 19/8/2004, the

appellants did not file the paper book within the stipulated time. Hence, the first appeal stood dismissed for want of prosecution. Hence, on 7/12/2004 and on 10/2/2005, these civil applications were filed.

10. This chronology of events, prima facie, makes it clear that the appellants want to procrastinate the litigation and prolong the agony of the investors. Having put thousands of investors in such pitiable predicament by luring them into investing money with them on false promises of giving them huge returns so as to multiply their investments, the least that the appellants could have done was to take necessary expeditious steps to get the appeal paper book prepared. The appellants were all along aware that the record of the appeal was lying in this court. It was called by Justice Mohite on 29/1/2004. As far back as on 12/3/2004, Justice Mohite had recorded the statement of the learned A.G.P. that while giving inspection, she will give xerox copies of the documents to the appellants' counsel. This was obviously done to facilitate the preparation of the paper book. No steps were taken by the appellants. This conduct of the appellants needs to be depricated. This inaction of the appellants is obviously because though the impugned order was not stayed since the record was here the trial court could not have proceeded with the sale of the properties. When these civil applications were placed before me, I also allowed the appellants to take inspection of the record so that the paper book

could be prepared. I am informed that the paper book is now prepared. I cannot loose sight of the fact that Justice Oka had admitted this first appeal on 19/8/2004. Because of inaction of the appellants, it was dismissed. Being a first appeal, in my opinion, the appellants must get a chance to argue their case before this court even assuming they have a very meagre chance of success. Hence, I propose to set aside the order of dismissal of the appeal and restore the first appeal to file.

11. The question is against the aforestated facts, what should be the interim relief. Looking to the plight of thousands of investors and considering the fact that it is not possible for the appellants to deny their liability, I made a herculean effort to bring about some workable arrangement, whereby at least some properties could be sold and some money could be paid to the investors. I felt that that would also reduce the burden on the appellants. But I found the approach of the appellants to be adamant. The proposals suggested by them, obviously without prejudice to their rights and contentions, are virtually an escape route to wriggle out of their liability.

12. Mr. Chatuphule, the learned counsel for the appellants urged that a workable solution could be found out only if the investments in portfolio management scheme could be segregated. He drew my attention to sections 15(b), 15(c), 15(i) and 15(y) of the Securities

and Exchange Board of India Act, 1992 (for short, "the SEBI Act") and contended that so far as SEBI registered portfolio schemes are concerned, penalties and adjudication are provided under the SEBI Act. Liabilities of the appellants will have to be adjudicated upon. Civil court has no jurisdiction to entertain any suit and an Adjudication Officer or the Securities Appellate Tribunal constituted under the SEBI Act can only look into the matter. He submitted that till date the liability of the appellants is not assessed. In the circumstances, the portfolio management investments must be kept out.

13. It is not possible for me to accept this submission. The so-called portfolio management scheme certificates indicate that the invested money carries fixed rate of interest. Some of the copies of such certificates have been shown to me. The rates of interest are mentioned over leaf. In my prima facie opinion, therefore, they would fall within the definition of deposit under the MPID Act. Prima facie, it is clear that the appellants have accepted deposits. Besides, my attention is drawn to the order dated 25/10/2001 in Misc. Application No.157 of 2001 where the Special Court has dealt with this issue and has stated that the appellants have not produced any agreement which they have entered into with their clients. The Special Court has further observed that even the intention to enter into such contracts have not been shown to have fructified into contracts of

portfolio management scheme. Prima facie, this view appears to be the correct view and I concur with it.

14. Having gone through the impugned order and the relevant affidavits and other material to which my attention is drawn, I am of the opinion that there does not appear to be any doubt about the fact that the appellants fall within the definition of the term "Financial Establishment" given in section 2(d) of the MPID Act. I have also gone through the notification issued by the Government with regard to the complaints received by the Government from the investors. It records the satisfaction of the Government that the appellants are not likely to return the deposits to the depositors and, hence, the Government has attached their properties. It prima facie appears to me that the appellants are not in a position to deny that thousands of investors have invested monies with them. An attempt made by the appellants to show that the properties are acquired by them out of their own funds has failed. No documentary evidence is shown by them. The appellants have not shown how they have acquired such huge properties. No Income-tax and Wealth-tax returns have been produced to show that these properties are reflected therein. What is important is that upon consideration of the case in depth, the Special Court has observed that the amount involved in this case shows that even the value of all these properties would be less than the value required for repayment to the depositors in this

case aggregating to several crores of rupees. About 18 crores are involved in this case. 1403 investors are waiting anxiously for return of their money. Most of them are small investors. It is necessary to give them some relief before they break down. Hence, in the peculiar facts and circumstances of the case, the sale cannot be stopped. Hence, I pass the following order:

O R D E R

"Delay in filing the paper book is condoned. Paper book be taken on file. Order of dismissal of the first appeal is set aside. First appeal is restored to file. It is admitted and expedited."

The Special Court with the assistance of the Competent Authority shall, for the present, sell 15 properties. As to which properties are to be sold shall be at the discretion of the Special Court. It shall distribute the sale proceeds amongst creditors/investors who prove their identities and receipts, on prorata basis. For the time being, the money to be returned to the creditors/investors shall not exceed 25% of the principal amount. However, the pattern of distribution is

left to the trial court and it shall be flexible.

The record of the case is in this court. Office is directed to send the record back to the trial court forthwith. However, as and when required, the record can always be called to this court. Hopefully, the first appeal would be disposed of expeditiously. Parties will make all efforts to move the regular court for fixing an early date of hearing. However, if the first appeal is not expeditiously disposed of, respondent 3 can always make an application to the court to which this first appeal will be assigned for modification of this order so that more properties can be sold. Needless to say that the observations on merits made in this order are prima facie observations.

15. Respondent 3 is at liberty to file the paper book. Needless to say that the court dealing with the first appeal can always order the parties to file such documents which may be necessary for the final disposal of the first appeal.

16. Both the above civil applications are disposed of in the aforestated terms.

17. Order to go to the Special Court forthwith.

(SMT. RANJANA DESAI, J.)